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No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

BRIEF OF AMICUS CURIAE CALIFORNIA LAND TITLE ASSOCIATION

In Support of Petition for Writ of Certiorari To the Supreme Court of the State of California

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I

THE INTEREST OF THE CALIFORNIA LAND TITLE ASSOCIATION STEMS FROM THE INSTABILITY WHICH THE DECISION BELOW CREATES IN TITLES TO 8½ MILLION ACRES OF LAND IN CALIFORNIA

The California Land Title Association ("CLTA") is a nonprofit association whose members represent 110 of the 139 title insurance companies and underwritten title insurance companies doing business in the State of California. For many years CLTA has acted as a spokesman and representative for its members in matters of common concern.

CLTA appeared below as amicus curiae in the proceedings before the California Court of Appeal and the California Supreme Court.

The members of CLTA have issued thousands of policies insuring title within confirmed Mexican land grants patented by the United States under the Act of March 3, 1851.[1] Based on the terms of that statute and the decisions of this Court, title insurers concluded that the federal confirmatory patents to these Mexican grants constituted unassailable "base title" to the lands encompassed within the patents. Until the decision below, it was deemed unnecessary to look behind the patents to determine whether they were subject to any latent title defects or encumbrances. As a result, when the source of title to lands was a federal patent reflecting unencumbered fee title, title insurers uniformly issued policies insuring against the risk that title was encumbered with a "public trust" easement in favor of the State of California.

Departing from its own prior decisions and those of this Court,[2] the California Supreme Court has now ruled that the State of California is the holder of a public trust

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[1] "An Act to Ascertain and Settle Private Land Claims in the State of California," 9 Stat. 631 (1851).

[2] On numerous occasions this Court has recognized that the state received no interest in federally-patented tidelands within Mexican land grants and that the federal patent was conclusive evidence of the patentee's interest in the granted lands. *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1866); *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891); *San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891); *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921). Until the decision below, California Supreme Court decisions were in accord. *Teschemacher v. Thompson*, 18 Cal. 11, 26 (1861); *Leese v. Clark*, 18 Cal. 535, 563 (1861); *People v. San Francisco*, 75 Cal. 388, 398, 17 P. 522, 526 (1888).

easement which arose under Mexican law, passed to the United States upon the cession of California from Mexico, was silently reserved in the federal patent confirming the Mexican grant and then passed from the United States to the state upon the admission of California to the Union.[3] The public trust easement is a title defect of such magnitude that to hold it was silently reserved in patents issued under the 1851 Act is the functional equivalent of concluding that no title at all passed to tidelands covered by the patents. The easement empowers the state to physically invade the land, to dictate the uses to which the land must be devoted, or to prevent any private use whatsoever of the property—all without compensating the landowner for the value of his land. It has been held that the state retains this public trust interest even after the lands become dry.[4]

The public trust is not, then, simply an element of the state's police power to regulate navigable and ecologically sensitive areas for the public good.[5] It is a property inter-

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[3] *City of Los Angeles v. Venice Peninsula Development Properties*, 31 Cal.3d 288, 644 P.2d 792 (1982), Appendix to Petition for Writ of Certiorari, pp. 13-15. References to the California Supreme Court decision will hereafter be cited as "App. at . . ."

[4] See discussion of the scope of the public trust easement at pp. 9-10, *infra*.

[5] Wetlands in California are already subject to an impressive list of federal and state regulatory schemes designed to prevent unnecessary development of ecologically sensitive lands. Rivers and Harbors Act of 1899, 33 U.S.C. § 402 *et seq.*; Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*; Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. § 1431 *et seq.*; Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; California Environmental Quality Act, Pub. Res. Code § 21000, *et seq.*; California Wetlands Preservation Act, Pub. Res. Code § 5810 *et seq.*; California Coastal Act, Pub. Res. Code § 30000 *et seq.*

est which serves to transfer to the state the most fundamental rights associated with land ownership.

Title to over 8½ million acres of California land is based on federally-patented Mexican land grants.[6] With few exceptions, these grants did not include beaches or navigable water bodies such as bays, rivers and lakes. However, shallow lagoons, sloughs, streams and ponds were often included within the boundaries of the grants.[7] Many of these areas are presently dry land and have been extensively developed. The Ballona Lagoon involved in this case is an example. It is now known as Marina Del Rey and is the site of substantial improvements consisting of private marinas, single-family residences, high-rise condominiums, office buildings and commercial complexes.[8] Comparable developed former wetlands exist in Mexican land grants along the coast in San Diego, Oceanside, Huntington Beach, Laguna Beach, Long Beach, Santa Monica, Santa Barbara, Santa Cruz, Oakland and San Francisco.[9]

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[6] Cowan, R., *Ranchos of California, passim* (1977). See Exhibit 1 attached hereto, a map prepared by the United States Department of Interior in 1885 depicting confirmed Mexican land grants in California. The Mexican grants are highlighted in green.

[7] It appears that lagoons were not considered by the Mexican governors of California to be part of the Pacific Ocean, because they were consistently included within grants which, like the grant here at issue, were bounded by the "seashore."

[8] See Exhibit 2 which depicts the location of the "inner bay" shown on the map of the Rancho Ballona and held to be tidelands by the court below in relationship to existing lands and improvements in Marina Del Rey.

[9] A comparison of the official rancho plats and modern quadrangle maps prepared by the United States Geological Survey establishes that many wetlands within Mexican land grants have been intensely developed. For example, tidal sloughs within developed portions of San Francisco were the subject of *City and County of San Fran-*

The State of California and the City of Los Angeles contended in the proceedings below that such dry and improved lands were subject to the burdensome public trust servitude. The California Supreme Court refused to exempt dry lands from the scope of its decision.[10] Armed with this ruling, the California State Lands Commission and the California State Coastal Commission are now actively claiming that the public trust exists over dry and developed properties.[11]

The effect of the decision below is not limited to private lands. The United States owns 90 miles of California coastline which it acquired from private owners of confirmed rancho grants. Included within these holdings are Ft. Ord Army Base, Vandenberg Air Force Base, Port Hueneme Naval Base, Point Mugu Naval Air Station, Terminal Island Naval Station, Camp Pendleton Marine Corps Base and United States Naval Station North Island.[12] Because the United States could take no better title than its private predecessors, wetlands and former wetlands within these federal holdings are not insulated from the public trust claims of the state.

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cisco v. LeRoy, 138 U.S. 656 (1891) and *Knight v. United Land Assn.*, 142 U.S. 161 (1891), in which this Court held that the State of California acquired no interest in tidelands within Mexican land grants.

[10]App. at 16, Footnote 15.

[11]The Coastal Commission has prepared a series of "redline" maps delineating those areas in which the public trust may exist. Both improved dry lands and existing wetlands are encompassed within the areas claimed to be subject to the trust.

[12]California State Lands Commission, *Inventory of Ungranted Tidelands: Survey Priority Study, passim* and Appendix C (1981).

In short, if the California decision stands, title to vast areas of federally-patented Mexican grants will remain clouded. Title insurers, caught in an irreconcilable conflict between the decision below and a series of decisions by this Court, cannot insure clear title to these properties. Without the security of a title insurance policy showing title free of the public trust easement, it is highly unlikely that purchasers will buy or lending institutions will finance the purchase of property or the construction of improvements. As a result, the sale and development of affected lands will come to a standstill so long as the possibility remains that the public trust easement was reserved. It is therefore in the interest of the members of CLTA as well as thousands of California landowners and potential purchasers that this Court review the decision below.

II

REASONS FOR GRANTING THE WRIT

CLTA concurs in and adopts the reasons for granting the writ set forth in the Petition of Summa Corporation for a Writ of Certiorari. There are, however, two additional points meriting discussion. First, the California court's decision that a patent which on its face transfers unencumbered fee title is nonetheless subject to an implicit reservation of the public trust easement is incompatible with Section 15 of the 1851 Act which provides that the patent is conclusive evidence of title. Second, by holding that the lands at issue were tidelands in 1850, notwithstanding a decision to the contrary by the United States General Land Office, the California Supreme Court has invited a reexamination of the decisions of that office and called into question

the finality of the factual determinations on which the issuance of all federal patents is based.

A. The Decision of the California Supreme Court is Incompatible with Section 15 of the 1851 Act

Section 15 of the 1851 Act provides that the federal patent confirming a Mexican land grant is conclusive against the United States. Accordingly, this Court has held that the United States and its successors, including the State of California, are bound by the federal patent. *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1866). The patent conclusively establishes title regardless of whether the property is tidelands. *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *City and County of San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891); *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891). This federally-patented title is unassailable despite the existence of potentially valid claims which were not asserted at the time of the confirmation proceedings. *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 481-482 (1924).

In *Beard v. Federy* this Court examined at length the binding effect of a United States patent issued under the 1851 Act:

> [T]he patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. . . . When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was

> valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. *As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.* 70 U.S. (3 Wall.) at 491-492. (Emphasis added.)

Faced with this and similar rulings, the California Supreme Court conceded that a patent issued pursuant to the 1851 Act is binding evidence of the title to and boundaries of the grant. The court even admitted that the patent was conclusive when it included tidelands.[13] Nonetheless, the court ruled that the conclusive effect of the patent was limited to bare legal title and did not extend to whether that title was subject to an implicit reservation of the public trust easement.[14]

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[13]App. at 13.

[14]It is not entirely clear whether the California court applied state or federal law in reaching this result. In the proceedings below, the City and the State argued that this case was governed by state law, citing *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910) and related cases holding that disputes over rights to use water from the Los Angeles River were governed by state law. The *Los Angeles Milling* line of authority is not, for a number of reasons, applicable to this case. First, *Los Angeles Milling* involved a dispute between two Mexican land grant patentees. As to those parties, the federal patent is nothing more than a confirmation of rights under Mexican law and is not the source of a federally-created right giving rise to a federal question. The rule is different in disputes involving a successor to the

By holding that the patent is binding on the issue of the patentee's underlying title but not as to the existence of the public trust easement, the California court has virtually nullified the conclusive effect of patents issued pursuant to the 1851 Act. Conclusive title encumbered by the public trust easement is not "title" to real property as that term is normally understood. The public trust easement is a title defect of unparalleled magnitude which effectively destroys private ownership of encumbered lands. In the exercise of the easement, the state may prevent trust

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United States, where the patent serves an additional function; it is conclusive evidence of the patentee's title. This is so because under Section 15 of the 1851 Act the patent is conclusive evidence only against the United States and its successors but not against third parties claiming under a confirmed grant from the Mexican government. Consequently, as between two patentees of Mexican land grants, state law controls the respective rights of the parties. However, as between a patentee of a Mexican land grant and a successor of the United States, including the State of California, the patentee is the beneficiary of a federally created right—the conclusiveness of the title conveyed by the federal patent—and federal law governs. *California Powder Works v. Davis*, 151 U.S. 389, 394 (1893).

Second, the federal patent is more than a confirmation of rights governed by Mexican or local law as against a party who failed to present his claim to the Board of Land Commissioners. Under Section 8 of the 1851 Act any person who claimed lands based on a right or title derived from Mexican law was required to present that claim to the Board for confirmation. Upon failure to do so, the claim was deemed abandoned, *regardless* of whether it was recognized under Mexican law. *United States v. Title Insurance & Trust Co.* 265 U.S. 472, 481-482 (1924).

Finally, state law is not controlling because this case involves the construction of the 1851 Act; specifically, whether the conclusive effect of a patent under Section 15 extends to the public trust easement and whether the provision of Section 8 mandating the presentation of claims to the Board of Land Commissioners applies to the State of California.

lands from being used at all—even by their owners—so that they remain in their natural condition. *Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374, 380-381 (1971). The easement authorizes the state to control access to trust lands, to physically invade the property and to dictate the use or "trust purpose" to which the land must be devoted.[15] The proper trust purposes which the state may prescribe are virtually unlimited.[16] The state may exercise these powers without paying compensation for the land's value and regardless of whether the property is now dry.[17]

Therefore, if the United States reserved the public trust easement when it issued a patent under the 1851 Act, the United States retained rights fundamental to property ownership; the patentee, on the other hand, received an interest so limited that it has been described as "naked title to the soil." *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913). The California court's holding that the conclusive effect of a United States patent is limited to this nominal interest strips virtually all meaning from Section 15 of the 1851 Act. In fact, the elaborate stat-

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[15]*People v. California Fish Co.* 166 Cal. 576, 588-589, 138 P. 79, 84 (1913); *Marks v. Whitney* 6 Cal. 3d 251, 260-261, 491 P.2d 374, 380-381 (1971).

[16]Proper trust purposes have been held to include harbor development, hydrocarbon, geothermal and mineral exploration and development *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928), *Mallon v. City of Long Beach*, 44 Cal.2d 199, 282 P.2d 481 (1955), California Pub. Resources Code § 6501-7062; a YMCA building *People v. City of Long Beach*, 51 Cal.2d 875, 338 P.2d 177 (1959); and keeping land in its natural state as a bird and wildlife sanctuary *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971).

[17]*Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 401, 60 P. 2d 825, 828 (1936); *Marks v. Whitney* 6 Cal. 3d 251, 259-261, 491 P.2d 374, 380-381 (1971).

utory scheme established by Congress for verifying Mexican claims would be seriously compromised if the sole effect of the confirmation proceedings were to confirm bare legal title.

The cited basis for the California court's determination that a public trust easement existed under the laws of Mexico was Law III and Law VI of Title XXVIII of *Las Siete Partidas*, the law in effect when California was a part of Mexico.[18] If the public trust easement allegedly established by those two laws was unaffected by the confirmation proceedings, it follows that other public rights recognized under Mexican law would likewise survive the issuance of the federal patent. For example, Law IX of *Las Siete Partidas* provides that "fountains," "the places where councils meet," "the sandy beaches on the banks of rivers," "the commons and roads traversed by horses," "mountains," and "pastures" are the "common property of all."[19] Under the reasoning of the California Supreme Court, public rights in "fountains," "mountains," "pastures," etc. which existed during Mexico's dominion over California would continue despite the issuance of a United States patent purporting to transfer unencumbered fee title. The patentee, although possessed of "conclusive" legal title, would nonetheless be deprived of the very essence of property ownership—the right to use his land to the exclusion of others. In such circumstances, as in the case of the public trust easement, the "conclusive" federal patent would be of negligible value as an "instrument of quiet and security to its possessor." *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-493 (1866).

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[18]App. at 8-9.

[19]*Las Siete Partidas*, CCH (Spain) (1931).

In short, by holding that a federal patent is subject to implicitly reserved public rights, the court below has called into question the integrity of title to all federally-patented Mexican land grants. There is a clear and irreconcilable conflict between the California Supreme Court decision, Section 15 of the 1851 Act and numerous decisions of this Court establishing the conclusiveness of federal patents. CLTA submits that this conflict, and the instability it creates in land titles throughout California, are substantial and persuasive reasons for granting the Petition of Summa Corporation for a Writ of Certiorari.

B. The Decision of the California Supreme Court Disrupts the Stability of Federally-Patented Land Titles by Inviting a Reexamination of Final Decisions of the United States General Land Office

The decision below rests upon the California court's factual determination that the lands at issue were tidelands at the time of statehood in 1850. As detailed in the brief of petitioner Summa Corporation, that finding is in direct conflict with the 1873 decision of the United States General Land Office that the "inner bay" depicted on the plat of the Rancho la Ballona was *not* an arm of the sea. The California court's reexamination of the evidence regarding the physical character of the lands in issue opens a Pandora's box which threatens to undermine the finality of the factual determinations on which the issuance of all federal patents is based.

This Court has repeatedly ruled that decisions of the General Land Office on questions of fact within its jurisdiction are final and unassailable in any collateral proceeding. *Heath v. Wallace*, 138 U.S. 573, 585 (1891); *French v.*

Fyan, 93 U.S. (3 Otto) 169, 171 (1876); *Johnson v. Drew*, 171 U.S. 94, 99 (1898); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447, 451 (1882). The leading case, *Heath v. Wallace*, illustrates that the rule applies with full force to determinations of the physical character of lands. That case involved the question of whether certain land designated on a map as "subject to periodical overflow" qualified as "swamp and overflowed" lands within the terms of the Act of September 28, 1850 (9 Stat. 519), granting such swamplands to the states. This Court noted that while the phrase "subject to periodical overflow" was ambiguous, any ambiguity had been conclusively resolved by the land department:

> It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. We are of the opinion, therefore, that the decision of the land department on a question of the actual physical character of certain lands is not subject to review by the courts. 138 U.S. at 585. (Citations omitted.)

The decision below merits review by this Court because it contravenes the foregoing rule and has severe consequences for the owners of federally-patented Mexican land grants as well as other federal patentees. If the factual basis of a General Land Office decision is open for re-examination 110 years after the decision is rendered, federally-confirmed land titles would be subject to endless upheaval. Any party asserting an interest in the patented land could compel the patentee to re-establish the validity of his claim, his right to the confirmation, the correctness of the decisions of the Board of Land Commissioners and the

General Land Office and even the validity of the decrees of the district court and of this Court upholding the grant. The patentee could find his claim recognized in one suit and rejected in another solely because different tribunals reached different conclusions regarding whether the evidence justified the land department's issuance of a patent. The patentee's title would be made to depend, not on the integrity of the federal patent, but rather on the fluctuating prejudices of different juries and their varying capacities to weigh the evidence. It is precisely these considerations which led this Court to conclude that decisions of the General Land Office in general, and patents issued pursuant to the 1851 Act in particular, are conclusive and invulnerable to collateral attack. *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-493 (1866); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447, 451 (1882).

Thus, if the decision below is not reviewed, owners of federally-patented Mexican land claims will be left in the precarious position of not knowing whether their property, after a reweighing of the evidence regarding its character in 1850, will be found to be tidelands subject to the public trust. Moreover, since the California Supreme Court refused to exempt dry lands from the scope of its decision, landowners cannot even rely on the fact that their lands are presently dry for assurance that the property is not legally "tidelands" burdened with the public trust easement.

Finally, if taken to its logical conclusion, the California Supreme Court decision has even wider and more disturbing ramifications. In its administration of the public land laws, the General Land Office was charged with the responsibility of making countless factual determinations regarding such matters as the qualifications of the purchaser, the

nature of the land and whether the property was open for sale. Such determinations have been repeatedly held to be unassailable in any collateral proceeding. *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447, 451 (1882). However, if a decision of the land office regarding the character of patented Mexican land grants may be reopened, what is to prevent similar challenges to the factual determinations of the department underlying all federal patents?

This potential for disastrous consequences only serves to illustrate that the California court has departed radically from a well-reasoned body of law developed by this Court to assure the integrity of United States patents and the stability of federally-patented land titles. CLTA submits that the court's refusal to follow the controlling precedents of this Court and to respect the decisions of the tribunals selected by Congress to verify Mexican land claims must not go unchecked. The California Supreme Court is increasingly bold in its disregard of private property rights,[20] so much so that the court actually supported its decision below on the "policy" ground that any other result would require the City of Los Angeles to pay just compensation to the landowners.[21] When the highest court of Cal-

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[20]In *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 606 P.2d 363, *cert. denied* 449 U.S. 840 (1980) the Court extended the public trust easement to lands surrounding San Francisco Bay sold by the State Board of Tideland Commissioners in the 1870's, overruling its decision in *Knudson v. Kearney*, 171 Cal. 250, 152 P. 541 (1915). In *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 625 P.2d 238 (1981), *cert. denied* (October 5, 1981, No. 81-163) the Court extended the public trust servitude to lands between the high and low water lines in navigable lakes notwithstanding the provisions of Civil Code Section 830 and numerous court decisions limiting any state interest to low water.

[21]App. at 15.

ifornia uses the circumvention of federal constitutional rights as a justification for its holding, it is clear that this Court is the last resort and only hope for landowners seeking to vindicate their rights under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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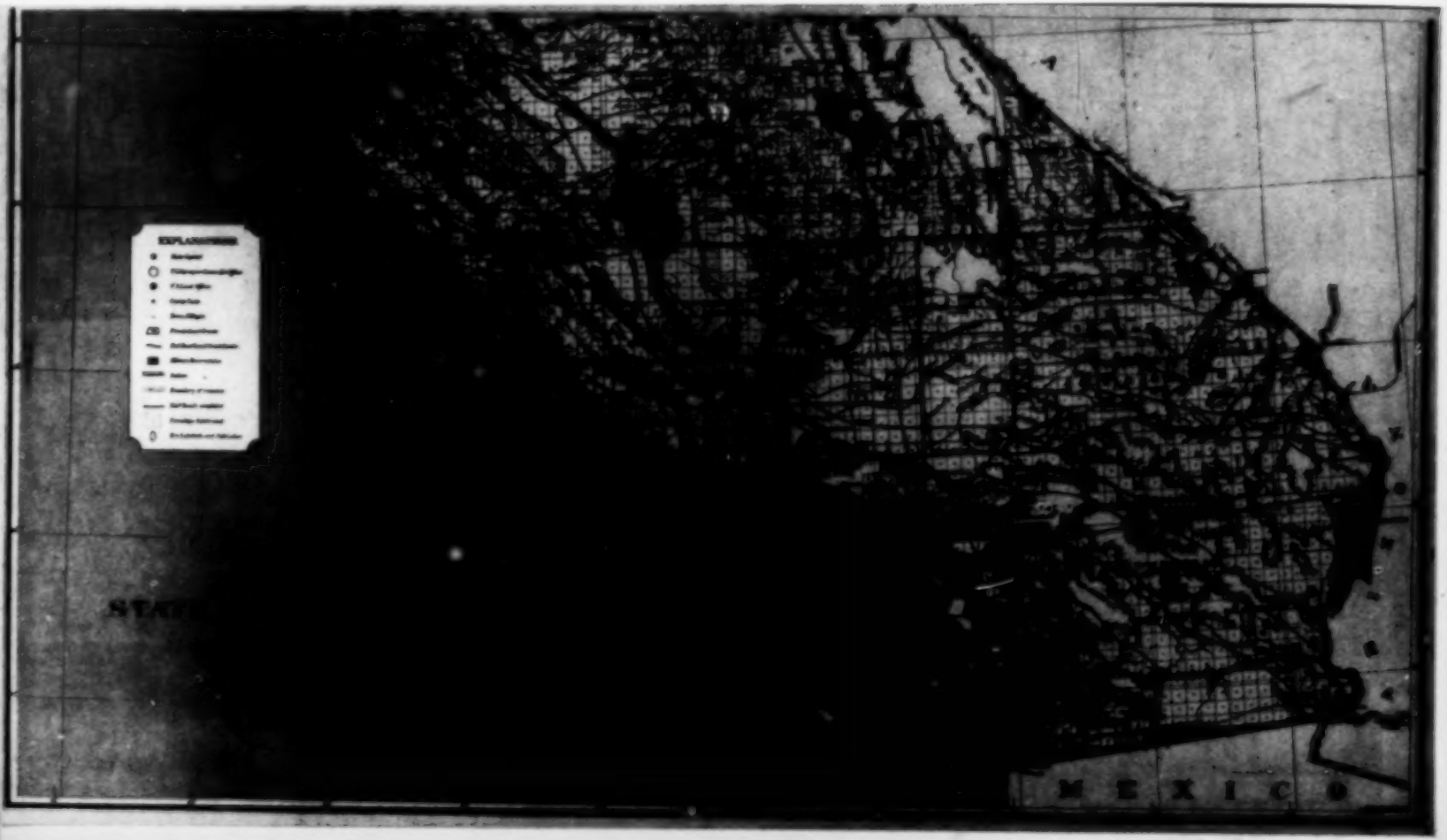
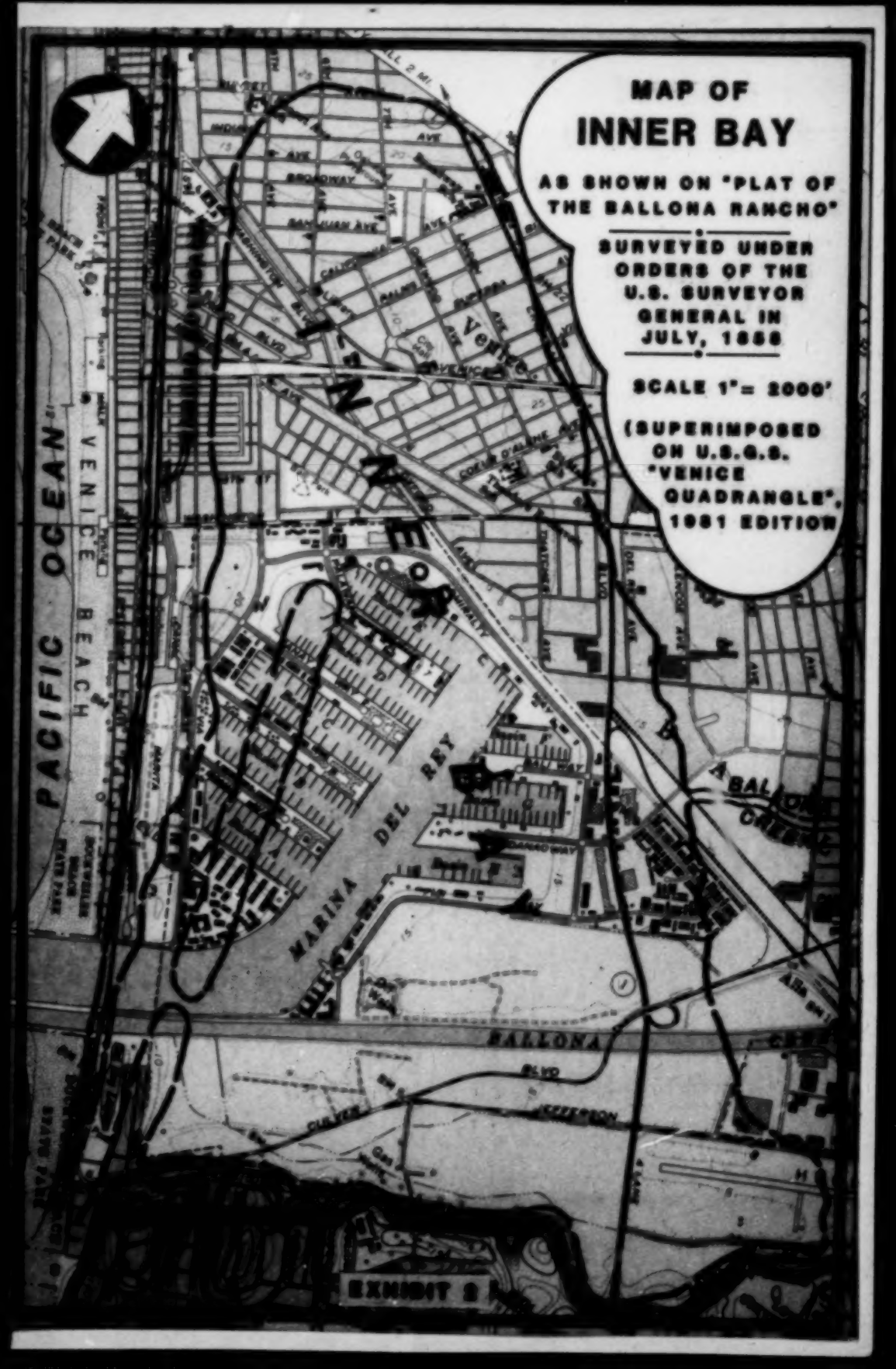
Exhibit 1


MEXICO


MAP OF
INNER BAY
AS SHOWN ON "PLAT OF THE BALLONA RANCHO"
SURVEYED UNDER ORDERS OF THE U.S. SURVEYOR GENERAL IN JULY, 1888
SCALE 1"= 2000'
(SUPERIMPOSED ON U.S.G.S. "VENICE QUADRANGLE", 1981 EDITION
PACIFIC OCEAN
VENICE BEACH
MARINA DEL REY
BALLONA
VENICE
EXHIBIT 2